IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

BRIAN BOWEN II, Plaintiff, v. ADIDAS AMERICA, INC.; JAMES GATTO; MERL CODE; CHRISTIAN DAWKINS; MUNISH SOOD; THOMAS GASSNOLA; and CHRISTOPHER RIVERS, Defendants.	C/A No. 3:18-3118-JFA **DEFENDANT JAMES GATTO'S REPLY TO PLAINTIFF'S CONSOLIDATED MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS**

Defendant James Gatto ("Mr. Gatto"), by and through undersigned counsel, hereby submits this Reply to Plaintiff's Consolidated Memorandum of Law in Opposition to Defendants' Motions to Dismiss (ECF No. 55) (hereinafter "Response"), and further hereby joins in the Replies to same filed by Defendants adidas America, Inc. ("adidas"), Christopher Rivers, and Monish Sood, insofar as the arguments are applicable.

With respect to the Defendants' arguments that Plaintiff has failed to adequately plead the alleged conduct proximately caused Plaintiff's injury, Plaintiff's attempts to argue that Mr. Gatto, Code, and Sood are allegedly estopped from challenging causation due to events in the criminal proceedings

against them, and erroneously concludes that proximate cause is established against all Defendants as a result of alleged concerted action by all Defendants. (*Id.* at 29 n.15.) Plaintiff's sole reliance on the criminal cases in opposing Mr. Gatto's Motion to Dismiss is fatal. Plaintiff has provided no evidence from those cases that would allow him to adequately plead Mr. Gatto committed two predicate acts of racketeering or that any two predicate acts were the proximate cause of Plaintiff's injuries.

As set forth in the adidas Reply, (1) Plaintiff lacks standing (a) because his alleged injuries are not recoverable under RICO and (b) because the alleged RICO violations did not proximately cause his purported injuries; (2) Plaintiff's claims are barred by *in pari delicto*; and (3) Plaintiff fails to allege an enterprise that is distinct from adidas and its employees and agents. (See adidas Reply Memorandum Of Law In Support Of Its Motion To Dismiss at 1-14) (ECF 65) Because Plaintiff's theory of liability against Mr. Gatto in Counts I and II in the Complaint are the same as Plaintiff's theory against adidas, Mr. Gatto joins in the adidas Reply as to arguments (1), (2) and (3) described above, as they all apply equally to him. Mr. Gatto incorporates these arguments raised in the adidas Reply by reference.

In addition, Mr. Gatto makes the following additional arguments in reply to the Plaintiff's response in its Opposition:

I. Wire Fraud: Neither Mr. Gatto nor the Court are Bound by the Criminal Proceedings as to the Sufficiency of the Complaint.

Plaintiff's attempt to piggyback off the prosecution in the Southern District of New York does not adequately establish the sufficiency of his pleading of wire fraud as one of three alternative predicate acts, each of which fail to state a RICO claim. Whether or not Plaintiff was injured by reason of a RICO violation was not "actually litigated." Further, the jury, in returning a general verdict, neither resolved the issues that Plaintiff seeks to estop Mr. Gatto from litigating, nor were such resolutions necessary for the jury to reach its verdict. *See Anderson v. Janovich*, 543 F. Supp. 1124, 1132 (W.D. Wash. 1982) ("[S]ince injury and causation were not actually litigated and necessary to the [RICO] convictions, defendants cannot be estopped from litigating those matters [in this civil RICO case].").

The issues of (1) whether Mr. Gatto harbored the necessary specific intent to harm Plaintiff, and (2) whether Mr. Gatto's conduct was the "direct" causal factor of Plaintiff's claimed injuries, were not litigated in the criminal case. Because Plaintiff has failed to plausibly allege non-conclusory, factual information as to each of these issues, as required by binding civil RICO pleading precedent, *see Slay's Restoration, LLC v. Wright Nat'l Flood Ins. Co.*, 884 F.3d 489, 494 (4th Cir. 2018), the motion to dismiss must be granted

pursuant to Fed. R. Civ. P. 12(b)(6).

Despite Plaintiff's best efforts in fifty (50) pages to characterize the criminal proceedings to the contrary, *see* Response at 28-30, Mr. Gatto is not estopped from challenging the sufficiency of the wire fraud allegations in the Complaint. In the first instance, Plaintiff fails to advise the Court of the proper legal standard governing offensive non-mutual collateral estoppel based on prior criminal proceedings.

A party asserting collateral estoppel must show that (1) the issue or fact is ***identical*** to the one previously litigated; (2) the issue or fact was ***actually resolved*** in the prior proceeding; (3) the issue or fact was ***critical and necessary*** to the judgment in the prior proceeding; (4) the judgment in the prior proceeding is final and valid; and (5) the party to be foreclosed by the prior resolution of the issue or fact had a full and fair opportunity to litigate the issue or fact in the prior proceeding. *In re Microsoft Corp. Antitrust Litig.*, 355 F.3d 322, 326 (4th Cir. 2004). In his analysis, *see* Response at 29, though citing *In re Microsoft*, Plaintiff omits the requirement that the issues be "identical." While this omission itself constitutes the point at which collateral estoppel fails, Plaintiff is also mistaken as to the remaining requirements.

Harm to the universities, at issue in the criminal proceeding, is not an "identical" issue to Plaintiff's alleged injury, which stems from a combination

of the university's, the Plaintiff's father's, and the Plaintiff's own decisions. Nor were factual issues regarding specific intent or direct causation regarding Plaintiff's claimed injuries "actually litigated" in the criminal proceeding. Further, resolution of the issues presented in this case was not "critical or necessary" for the jury to reach its verdict in the Southern District of New York, because they were not part of the jury charge, and factual resolution of these issues are in any event not discernible by the general verdict reached. Even where a jury returns a special verdict, it may be impossible to determine whether an issue was actually decided, *see Haywood v. Ball*, 634 F.2d 740, 742–743 (4th Cir. 1980), and general verdicts are even more elusive. *C.B. Marchant Co., Inc. v. Eastern Foods, Inc.*, 756 F.2d 317, 319 (4th Cir. 1985).

In *C.B. Marchant*, the Fourth Circuit held that where a prior general verdict could have been reached on one of two alternative theories, the application of offensive non-mutual collateral estoppel was properly denied. *Id.* at 319-320. Because the jury could have reached its verdict on either ground, it was "impossible to discern" whether the issue sought to be precluded from re-litigation was "necessary" to the prior judgment. *Id.* at 319.

The criminal proceedings in the Southern District of New York therefore, fails to support the application of collateral estoppel as the Plaintiff was not even the alleged victim of wire fraud. Even if such a theory had been

presented to the jury, *C.B. Marchant* would control and collateral estoppel would be equally inappropriate.

Indeed, the prosecutors' theory and the jury charge itself turned on specific intent to defraud the universities, not Plaintiff, whose expectation injuries would necessarily be derivative thereto. Plaintiff's claim that he is a "student-athlete victim" of racketeering activity, Compl. ¶ 119, offered in an attempt to secure standing, has not been resolved in any proceeding and is otherwise implausible by reason of the derivative nature of his claimed injuries. The lack of any allegations supporting Mr. Gatto's specific intent to defraud Plaintiff requires this Court to dismiss this action.

II. Money Laundering: The Complaint Fails to Allege Facts that Support a Predicate Act of Money Laundering.

Plaintiff's Response fails to address how the Complaint plausibly pleads the predicate act of money laundering in light of binding law requiring that money used to pay alleged bribes was "derived" from unlawful activity, or that Mr. Gatto had subjective knowledge thereof. *See, e.g., United States v. Santos*, 553 U.S. 507, 511 (2008). Instead, Plaintiff reiterates his theory of money laundering set forth in the Complaint that "[a]didas, Rivers, and Gatto funded bribes ***out of corporate coffers***[.]" Response at 34. Plaintiff's theory of money laundering therefore requires that the Court accept the false premise that adidas' "corporate coffers" are made up of money derived entirely from

unlawful activity, which is not reasonably inferable on any basis set forth in the Complaint. As such, money laundering is not pleaded with enough sufficiency as a predicate act to make out a RICO claim, and the action must be dismissed.

III. Sports Bribery: the Breadth of the Statute does not Render it All-Encompassing

Plaintiff relies exclusively on *United States v. Walsh*, 544 F.2d 156 (4th Cir. 1976), one of the few decisions interpreting the statute, in support of the proposition that the federal sports bribery statute is broad enough to include the alleged facts of this dispute. A review of this case undermines the inferences Plaintiff wishes the Court to draw from his selective excerpts from its text.

In *Walsh*, three jockeys agreed to fix a race in combination with the placement of dozens of bets that would be winners as a result of the jockeys' corrupted efforts. *See id.* at 157-58. On appeal, defendants argued, *inter alia*, (1) that the statute didn't apply to contestants, only "outsiders," and (2) that horse racing was not a covered "sporting contest" because horses were not "individuals." *Id.* at 158-59. The Fourth Circuit affirmed the statutes' breadth because there is no relevant text in 18 U.S.C. § 224 that supported the defendants' fairly absurd arguments for a much more narrow reading. *See id.* at 158-59.

Plaintiff's reliance on *Walsh*'s language is misplaced, and, despite the statutes' breadth, it expressly requires that a defendant act to "influence" a sporting contest "with knowledge that the ***purpose*** of such scheme is to influence by bribery that contest." 18 U.S.C. § 224 (emphasis added).

Plaintiff's Complaint and Response do not permit the inference that Mr. Gatto sought to "influence" a sporting contest, and the entire Complaint contradicts the theory that any alleged scheme had, as its purpose, such influence. Viewed in the light most favorable to Plaintiff, the purpose of the alleged scheme was to have good players wearing adidas' products, and that any influence on a sporting event was not a "purpose" of such a scheme but a severely attenuated and collateral effect. *Cf. United States v. Vogt*, 910 F.2d 1184, 1202 (4th Cir. 1990) (noting that conviction for tax conspiracy cannot stand where impeding the IRS is only a "collateral effect of an agreement, rather than one of its purposes.")

IV. Conclusion

For the reasons stated in the adidas Motion, adidas Reply, and the reasons exclusive to Mr. Gatto stated in the Motion and this brief, Mr. Gatto

requests that this Court dismiss Plaintiff's Complaint against him with prejudice pursuant to Fed. R. Civ. P. 12(b)(6).

Respectfully submitted,

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This the 20th day of March, 2019.